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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1974
No. 74-627

JAMES LEROY NELSON,

Petitioner,

vs.

STATE OF SOUTH DAKOTA,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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Respondent prays that the Petition for Writ of Certiorari to review the Decision of the Supreme Court of South Dakota in the case entitled *State v. Nelson*, found in the Appendix to the Petitioner's Brief, be denied.

JURISDICTION

The Supreme Court of the United States should not invoke jurisdiction in this case

because:

1. Petitioner "complains that our second degree manslaughter statute, SDCL 22-16-20, is unconstitutionally vague and that it was error to allow the jury to consider manslaughter as a lesser offense necessarily included in the prosecution which was one for murder. These *two matters are not urged as reversible error*, but are discussed only as part of the totality of circumstances." *State v. Nelson*, 220 N.W. 2d 2 (emphasis added).

2. *Rule 19 of the Supreme Court Rules* states that:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The Supreme Court of the United States should deny this Petition because, as the record discloses, the decision of the Supreme Court of South Dakota is in every respect correct and there has been no violation, denial, or abuse of any of the

constitutional or statuory rights of the Petitioner.

QUESTIONS PRESENTED

Was the reversible error committed in the trial court which permitted two inmates to testify as to dying declarations made by the deceased, Wayne Sherwood?

STATEMENT OF THE CASE

On October 4, 1971, the Defendant, James Nelson and Wayne Sherwood were inmates at the South Dakota State Penitentiary. On that date, at approximately 8:20 in the evening, Wayne Sherwood became violently ill. Several persons who were with him at the time testified that he was "talking and joking" with them when he suddenly complained of having trouble seeing and breathing. They further testified that moments later he became rigid, was unable to stand, went into convulsions, turned blue in the face, and appeared to be in a great deal of pain. He was immediately removed from the prison and taken to a local

hospital where he was pronounced dead shortly after his arrival. On the following day, an autopsy was performed on Sherwood's body which failed to reveal the cause of his death. However, gastric and urine samples which were removed from the body during the autopsy were subsequently examined and found to contain strychnine. Based upon the symptoms of his illness and the finding of strychnine in the gastric and urine samples, the physician who conducted the autopsy expressed the opinion that Sherwood died of strychnine poisoning. There was evidence that at approximately 8:10 on the evening of his death, Sherwood was watching T. V. with several other inmates when he was approached by Pickering and Nelson. After the two asked to talk with him, Sherwood accompanied them to the barber shop-toilet area. While the three were alone in the barber shop-toilet, an inmate who was waiting outside observed Pickering hand several "blue capsules" to Sherwood. The

inmate testified that although Sherwood appeared somewhat reluctant at first to take the pills, Pickering and Nelson eventually persuaded him to swallow them. After taking the pills, Sherwood returned to the area where he had been watching T.V. and a few minutes later he was overcome with his fatal seizure. At Nelson's trial, testimony was offered by two inmates who were with Sherwood just before his death. One of the inmates testified that immediately before he lost consciousness, Sherwood admitted that he had just taken some blue pills that were given to him by Pickering and Nelson. The inmates further testified that Sherwood stated, "do you think that Pat and him would do that to me, would give me some bum pills." The second inmate testified that he had heard a part of this conversation. Both inmates testified that at the time Sherwood made these statements, he was having trouble seeing and breathing and that he appeared to be in great pain.

It was also established at the trial that Sherwood died minutes later.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Petitioner relies on *Shepard v. United States*, 290 U.S. 96, 78 L.Ed. 187 (1933) and *State v. Swenson*, 26 S.D. 859, 129 N.W. 119 (1910) in support of his reasons why the Writ of Certiorari should issue from this Court. *Shepard* and *Swenson* are readily distinguished as far as any application to the instant case is concerned. In the factual situation of *Shepard*, it is revealed:

> We have said that the declarant was not shown to have spoken without hope of recovery and in the shadow of impending death. Her illness began on May 20. She was found in a state of collapse, delerious, in pain, the pupils of her eyes dilated, and the retina suffused with blood. The conversation with the nurse occurred two days later. At that time her mind had cleared up, and her speech was rational and orderly. There was as yet no thought by any of her physicians that she was dangerously ill, still less that her case was hopeless. To all seeming,

> she was greatly improved, and was moving forward to recovery. There had been no diagnosis of poison as the cause of her distress. Not until about a week afterwards was there a relapse, accompanied by an infection of the mouth, renewed congestion of the eyes, and later hemorrhages of the bowels. Death followed on June 15.

In *Swenson*, the factual situation briefly, determined by the South Dakota Supreme Court, tells us that in the morning of July 7, 1909, it was alleged that Charles Swenson, husband of the decedent and son of the accused, was at his brother's place assisting in scraping a ditch. Charles Swenson returned to his home for dinner about 12:00 o'clock of that same day. In the afternoon of the same day the witness was intending to go to the field to cultivate corn, but wanted to speak to his wife before going away and went upstairs and saw her lying behind the chimney on her back on a box of clothes. He spoke to her but she did not answer. She was breathing hard like she was sleeping; her hands

were hanging down and her feet on the floor. When she did not answer, her husband took hold of her and raised her up. She started to vomit and vomitted quite a little but did not say a word. She was just like she was dead only she was breathing. He could see that his wife had fainted. Charles Swenson then carried his wife downstairs and laid her on the bed. No one else was in the room. Shortly after, she came too and said she was awfully sick. Charles Swenson got her some water and she drank it. She asked for water several times. This was about 2:00 o'clock in the afternoon of the same day. Charles Swenson stayed with his wife all day except going off from her a little. Charles Swenson thought all afternoon, until around seven o'clock or so, that his wife was getting better. Decedent wanted Charles Swenson to get her a doctor. This, he did. About on-half hour after the doctor left, decedent had shaking spells, requested her

husband to hold her and she laid perfectly still for about five or ten minutes. Charles Swenson testified that a little after eight o'clock he went to telephone for the doctor a second time, but the decedent did not ask him to go for the doctor. Charles Swenson then went to a neighbor's home to telephone for the doctor for the second time and was gone from his own house about twenty minutes. When Charles Swenson returned to his own house from the Carlson residence, he found his wife dead, she having died during his absence.

It is not necessary that the decedent manifest an awareness of approaching death by some verbal statement. As stated in *Shepard*, supra, Justice Cardozo rules:

> Despair of recovery may indeed be gathered from the circumstances if the facts support the inference . . . There is no unyielding ritual of words to be spoken by the dying.

Wigmore states:

> No rule can here be laid down (as to how to determine awareness of approaching death).

> The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances. V. Wigmore, §1442 at 230 (3rd ed. 1940)

In *Swenson*, the decedent lingered for over a day. In this case Sherwood died quickly and convulsively. It is not necessary to show a statement by the decedent that he was conscious of impending death. That expectation may be inferred from the circumstances of his condition. *Penn v. State*, 119 Neb. 94, 227 N.W. 314 (1929); *State v. Hanson*, 53 N.D. 879, 207 N.W. 1000 (1926). Whether or not it can be inferred that the declarant was conscious of impending death is a preliminary question to be determined by the trial court in the exercise of its discretion. The trial court's decision in such a matter will be reversed only where there has been a clear abuse of discretion. *5A CJS, Appeal and Error*, §1664, pp 238-241. No such abuse of discretion is revealed from

the record in the present case. When all of the circumstances are considered the trial court was justified in concluding that Sherwood made statements under the fixed and solemn belief that his death was inevitable and near at hand. These dying declarations of Sherwood, therefore, are admissible. SDCL 23-44-4.

CONCLUSION

The trial court did not abuse its discretion in permitting two inmates, who were friends of the decedent, to testify as to alleged dying declarations uttered by Wayne Sherwood where his death occurred within ten minutes of taking the capsules containing strychnine. This Court should affirm the conviction of Mr. Nelson and deny the Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

Walter W. Andre, one of the attorneys for Respondent and a member of the Bar of the Supreme Court of the United States hereby certifies that on the ___ day of December, 1974, three copies of Respondent's Opposition to Writ of Certiorari were served upon Thomson, Wylde, Nordby & Friedberg, Jack S. Nordby and Douglas W. Thomson on the Brief, Suite 1530, 55 E. 5th Street, St. Paul, Minnesota 55101, by mailing three copies duly addressed and with proper postage prepaid.

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One of the Attorneys for
Respondent